Office-Supreme Court, U.S.
FILED
AUG 27 1981
ALEXANDER L. STEVAS,
CLERK

80-2145

In the Supreme Court of the United States

OCTOBER TERM, 1980

No.

JERRY EDWIN HOLCOMBE,
PETITIONER,

versus

STATE OF SOUTH CAROLINA,
RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL R. MCLEOD
Attorney General

BRIAN P. GIBBES
Senior Assistant Attorney General

LINDY P. FUNKHOUSER
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211

ATTORNEYS FOR RESPONDENT.

INDEX

	PAGE
Cases Involved	iii
Opinion Below	1
Jurisdiction	1
Statement of the Case	2
Argument	4
Conclusion	7

CASES INVOLVED

	PAGE
Mullaney v. Wilbur, 421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975)	6
Sandstrom v. Montana, 442 U.S. 510, 61 L. Ed. 2d 39, 99 S. Ct. 2450 (1979)	4
State v. Crocker, 272 S.C. 344, 251 S.E. 2d 764 (1979)	6
State v. Friend, et al., Op. No. 21522, ___ S.C. ___, ___ S.E. 2d ___, July 21, 1981	6
State v. Heyward, 197 S.C. 371, 15 S.E. 2d 669 (1941)	4
State v. Kennedy, 85 S.C. 146, 67 S.E. 152 (1909)	4
State v. Mattison, ___ S.C. ___, 277 S.E. 2d 598 (1981)	6
State v. Williams, 189 S.C. 19, 199 S.E. 906 (1938)	4

In the Supreme Court of the United States

OCTOBER TERM, 1980

No.

JERRY EDWIN HOLCOMBE,
PETITIONER,

versus

STATE OF SOUTH CAROLINA,
RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of South Carolina and order denying rehearing, affirming the judgment of the lower court, are shown in Appendices 6 and 7 of the Petition for Writ of Certiorari.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTION PRESENTED

I.

Did the instructions of the court below relieve the State of its burden of proving beyond a reasonable doubt the element of malice to the crime of murder?

STATEMENT OF THE CASE

On June 29, 1979, Mr. Claude Swafford picked up his four year old daughter, Amy, from his mother-in-law's house in Oconee County, South Carolina, after getting off work at 6:00 p.m. Mr. Swafford's wife, who usually gets off work at 4:30 p.m., arrived at home at about 9:30 p.m., while he was preparing supper for their daughter. Although Mrs. Swafford indicated to her husband that her grocery shopping had caused her late arrival, she had actually been at the home of her paramour, Mr. Jerry Edwin Holcombe, the Petitioner in this case. Mrs. Swafford and Mr. Holcombe had carried on an affair for approximately one year, and they had intentions of getting married in the future but Mr. Swafford would not consent to the divorce.

Mr. Holcombe, sometime shortly after 9:30 p.m., telephoned this Swafford residence to talk to Mrs. Swafford, thinking that Mr. Swafford had already left for work. However, Mr. Swafford was at home and he picked up the conversation between Mrs. Swafford and Mr. Holcombe on the extension phone. In the ensuing conversation, Mr. Swafford told Petitioner to leave his wife alone, and Mr. Holcombe replied with threats against Mr. Swafford's life. Mr. and Mrs. Swafford argued for approximately ten or fifteen minutes after the telephone conversation concerning Mrs. Swafford's plans to take their daughter, Amy, to Florida on vacation. At this point, the Swaffords and Amy walked out onto their lighted garage and carport.

While standing in the carport, Mr. Swafford noticed a vehicle pulling into his next door neighbor's yard, and then

heard the "click of a shotgun being loaded . . . ." Immediately thereafter, Mr. Holcombe shouted from the vehicle, "here, take this" and fired the shotgun into the garage and carport where Mr. Swafford was standing. Mr. Swafford ran into his house to get his gun, and when he came out he saw Jerry Holcombe's four-wheel drive Ford pickup truck proceeding down the road at a rapid rate of speed.

Immediately after the shot was fired, Amy Swafford cried out and ran into her mother's arms. She died within a matter of seconds from a buckshot pellet which penetrated the center of her chest through the breastbone.

Petitioner's version of this sordid tale was presented mainly through his confession and his testimony at trial. He was arrested at his residence at 11:16 p.m. on June 29, 1979, and taken to the Oconee County Law Enforcement Center in Walhalla, South Carolina. At 4:55 a.m. on June 30, 1979, police officers served a duly executed arrest warrant for murder upon Petitioner, and he agreed to give a statement at that time. This statement and his testimony at trial were very similar. Petitioner indicated that he went to the Swafford home on the night of June 29, 1979, in response to certain verbal threats made by Mr. Swafford during their brief conversation on the telephone. Mr. Holcombe stated that his shotgun accidentally fired while he was sitting in his vehicle with his gun pointed at the ground outside of his window. Mr. Holcombe indicated in his testimony that he did not know the shotgun was loaded at the time of the shooting, but that he later remembered loading the shotgun with the .00 buckshot shell to go rabbit hunting a few days earlier. He further testified that when he subsequently got home he took the shotgun "down to my brother-in-law's for him to clean it." The State introduced evidence, at trial, of a spontaneous declaration made by Petitioner to a correctional officer, stating that he "didn't mean to shoot the little girl but [he] did the man."

At trial, the lower court charged the jury concerning the common law definition of murder, i.e., the killing of another

human being with malice aforethought. He also instructed the jury concerning the doctrine of transferred intent to show that a person need not kill his intended victim in order to be criminally liable for common law murder. Furthermore, the lower court charged the jury that the State had the burden of proving that the killing of Amy Swafford was not accidental. After some deliberation, the jury returned to the courtroom and requested to be charged on the definition of malice. In this charge the lower court made it explicitly clear that the burden of proving malice was at all times upon the State and that any presumption of malice was rebuttable under all the evidence presented in the case.

Petitioner was convicted in the trial court and the conviction was affirmed by the South Carolina Supreme Court on February 5, 1981.

ARGUMENT

I.

The charge of the lower court, considered in its entirety, clearly apprised the jury of the State's burden of proving beyond a reasonable doubt the element of malice to the crime of murder. (Petitioner's Question I.)

Petitioner has attempted to excise a sentence from the instructions given by the lower court and place it out of context in his effort to invoke the principles enunciated by this Court in *Sandstrom v. Montana,* 442 U.S. 510, 61 L. Ed. 2d 39, 99 S. Ct. 2450 (1979). Actually, the statement that "one intends the probable and natural consequences of his act" was given in connection with the charge on the doctrine of transferred intent, to illustrate to the jury that, in a prosecution for the crime of murder, the State is not required to prove that the victim of the homicide was the person which the defendant intended to kill. South Carolina cases on this subject are *State v. Heyward,* 197 S.C. 371, 15 S.E. 2d 669 (1941); *State v. Williams,* 189 S.C. 19, 199 S.E. 906 (1938); *State v. Kennedy,*

85 S.C. 146, 67 S.E. 152 (1909). Thus, what Petitioner attempts to relegate to a presumption of fact is, in actuality, an explanation of legal principles as they apply to the evidence of the case.

The transcript of the trial makes it quite clear that the jury was not misled as to the essential issue which it was called upon to decide. Appellant's counsel, during closing arguments, summarized the true issue in the case as follows:

> But the question is did Jerry Holcombe unlawfully attempt to kill Claude Swafford with malice aforethought and by mistake kill Amy Swafford? That's the question. (Tr. p. 267, lines 13-15.)

The Solicitor, during closing arguments prior to the lower court's charge, also focused the jury's attention on this issue which the State was required to prove. (Tr. p. 268, line 11-p. 273, line 4.)

Immediately after the arguments of counsel the lower court charged the jury as to the State's burden of proof as follows:

> Murder is the unlawful or felonious killing of any person with malice aforethought either expressed or implied. Hence, in order to convict on murder, the State must not only prove the killing of the deceased by the defendant but it must be proven to have been done with malice aforethought, and such proof must be beyond a reasonable doubt.
>
> * * *
>
> Malice means the doing of a wrongful act intentionally and without just cause or excuse.
>
> * * *
>
> I charge you that even if the facts proven are sufficient to raise a presumption of malice, such presumption would be a rebuttable one and it is for you the jury to determine from all of the evidence whether or not malice has been proven beyond a reasonable doubt. (Tr. p. 275, lines 3-8; p. 276, lines 4-11.)

Also, in connection with this initial charge concerning the crime of murder, it should be noted that Petitioner was given the benefit of a presumption that the killing was accidental, since the lower court specifically instructed the jury that the State had the burden of proving beyond a reasonable doubt that the killing was not accidental, negligent or reckless. (Tr. p. 281, lines 15-25.) Petitioner cannot possibly claim that the jury could have been confused, especially in view of the trial court's later instructions in response to the jury's question on the subject of malice.

Durings its deliberations the jury came back in to the courtroom with a question for the trial judge. The foreman indicated that "we were'nt sure on the subject of malice." (Tr. p. 289, lines 9-10.) In answering the foreman's question the lower court reaffirmed its instruction that "the State must not only prove the killing of the deceased by the defendant but it must be proven to have been done with malice aforethought, and such proof must be beyond a reasonable doubt." (Tr. p. 289, lines 15-18.) Also, the court indicated that any presumption raised by the evidence was rebuttable, and, consequently, not conclusive. (Tr. p. 292, lines 3-9.) This later instruction contains no statement whatsoever that a person intends the probable and natural consequences of his act, thereby absolutely demonstrating that the sentence which Petitioner claims is prejudicial only related to the doctrine of transferred intent, not to the element of malice. Therefore, there can be no question but that this jury understood the quantam of proof necessary for the State to prove in order to convict for the crime of murder.

The standard set forth by this Court in *Mullaney v. Wilbur,* 421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975), and its progeny, was thoroughly covered before the South Carolina Supreme Court on this issue. Cases which demonstrate the South Carolina Supreme Court's proficiency in dealing with this subject are *State v. Friend, et al.,* Op. No. 21522, ___ S.C. ___, ___ S.E. 2d ___, July 21, 1981; *State v. Mattison,* ___ S.C. ___, 277 S.E. 2d 598 (1981); *State v. Crocker,* 272 S.C. 344,

251 S.E. 2d 764 (1979). We feel that the South Carolina Supreme Court properly applied the standards of *Sandstrom v. Montana, supra,* in concluding that under the facts of this case the State was not relieved of its burden of proving beyond a reasonable doubt all elements of the crime of murder.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitoner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DANIEL R. MCLEOD
Attorney General

BRIAN P. GIBBES
Senior Assistant Attorney General

LINDY P. FUNKHOUSER
Assistant Attorney General

ATTORNEYS FOR RESPONDENT.